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In the Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~829~~ 200

THE UNITED STATES OF AMERICA, PETITIONER

v.

OLYMPIC RADIO AND TELEVISION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in this case on November 4, 1952, rehearing denied, March 3, 1953.

OPINIONS BELOW

The original opinion of the Court of Claims (R. 10–14) and the dissenting opinion, entered November 4, 1952, are reported in 108 F. Supp. 109. The opinion on rehearing (R. 16–19), entered March 3, 1953, is reported in 110 F. Supp. 600.

JURISDICTION

The opinion and judgment of the Court of Claims were entered November 4, 1952. (R. 14.) On December 3, 1952, the Government filed a motion

for rehearing. On March 3, 1953, the court denied the motion. (R. 19.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Whether, under Section 122 (d) (6) of the Internal Revenue Code, a taxpayer on the accrual basis can, in computing its net operating loss for one year, deduct the amount of excess profits taxes paid in that year but which accrued in an earlier year.

STATUTE INVOLVED

The applicable portions of the pertinent statute are set forth in the Appendix, *infra*, pp. 12–18.

STATEMENT

This case was submitted to the court below on motions for summary judgments filed by both parties, together with supporting affidavits. The facts, which are not in dispute, are briefly as follows:

Taxpayer, a corporation, keeps its books and accounts and files its income tax returns on the accrual basis. (R. 1.) Its income tax return for the year 1946 disclosed no income tax liability and reflected a net operating loss of $324,844.23. (R. 2.) Upon the audit of the taxpayer's income tax return for the year 1946, the Commissioner of Internal Revenue reduced the net operating loss for the year 1946 to $310,872.60. (R. 2.) Taxpayer, in its excess profits return for the year 1945, reported an excess profits tax liability of $346,643.22. Of this amount $263,272.80 was paid in 1946. (R. 2.)

Taxpayer duly filed a claim for refund of income and excess profits taxes for the year 1944 in the amount of $191,004.04. This claim was based on the ground that the excess profits taxes for 1945 paid during 1946 should be added to the agreed net operating loss for 1946 under Section 122 (d) (6) of the Internal Revenue Code. The amount of $263,272.80, the excess profits tax for 1945, paid in 1946, was later refunded or credited to the taxpayer, as a result of the allowance of carry-backs for 1947. (R. 10.)

The Court of Claims (Madden, J., with whom Jones, C. J., concurred, dissenting) held that, in computing its net operating loss for 1946, the taxpayer was entitled to deduct the amount of the excess profits taxes shown on its 1945 return and paid in 1946. The court entered judgment in favor of the taxpayer in the amount of $148,841.72, with interest. (R. 14.)

REASONS FOR GRANTING THE WRIT

1. As the Court of Claims expressly recognized (R. 14), its decision, allowing an accrual basis taxpayer to increase its net operating loss by the amount of an earlier-accrued excess profits tax actually paid in the taxable year, is in direct conflict with that of the full Tax Court, rendered without dissent, in *Lewyt Corp.* v. *Commissioner*, 18 T. C. 1245. See, also, *W. L. Maxson Corp.* v. *Commissioner*, decided January 26, 1953 (1953 P-H T. C. Memorandum Decisions, par. 53,021). And see *Estate of Byrne* v. *Commissioner*, 16 T. C. 1234, deciding the same issue

in favor of the Government without extended discussion.

In the *Leuyt* case, the Tax Court held (18 T. C. at 1249–1253), in square conflict with the decision below, that an accrual basis taxpayer cannot, under Code Section 122 (d) (6) [1] (Appendix, *infra*, p. 14), increase its net operating loss for a particular year for carry-back purposes by the excess profits tax which was paid in that year but which accrued in a prior year. The basis for the decision of the Tax Court was that, while Section 122 (d) (6) allows as a deduction the excess profits tax "paid or accrued within the taxable year," the alternative verbs "paid or accrued" were used to comprehend, and distinguish between, taxpayers on a cash or accrual basis (*i. e.*, "paid," if on

[1] Section 122 (a) of the Code defines the "net operating loss", which may be carried back to and be deducted in two previous years under Code Sections 23 (s) and 122 (b) (1) and (c) (Appendix, *infra*, pp. 12, 13–14), as the excess of the deductions "allowed by this chapter", *i. e.*, the chapter imposing the income tax, over the gross income, with the exceptions, additions, and limitations provided in subsection (d). Section 122 (d) (6) provides that there shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2, *i. e.*, the excess profits tax, "paid or accrued within the taxable year." Section 48 (c) (Appendix *infra*, p. 13) provides that when used in this chapter, *i. e.*, the chapter imposing the income tax and the chapter containing Section 122 (d) (6), the term "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed, and Section 43 (Appendix, *infra*, pp. 12–13) provides that the deductions provided for in this chapter, *i. e.*, the income tax chapter containing Section 122 (d) (6), shall be taken for the taxable year in which "paid or accrued", dependent upon the method of accounting on the basis of which net income is computed.

cash basis, and "accrued," if on accrual basis), and were not designed to give an accrual basis taxpayer the right to deduct its excess profits tax in the year paid, if the tax accrued in another year.[2] See Code Sections 43 and 48 (c) (Appendix, *infra*, pp. 12–13), and see footnote 1, *supra*. This conflict between the Court of Claims and the Tax Court on a question of such recurrent importance in the administration of the tax law would seem to require resolution by this Court at this time.[3] We are informed by the Department of the Treasury that the same issue is presented in at least 35 (and probably more) other cases now pending before the Court of Claims, the district courts, the Tax Court, and the Treasury, involving a total of at least $27,000,000 in taxes, plus interest. Other taxpayers will doubtless raise the same question in other cases.[4]

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[2] The holding that the term "paid or accrued" in Section 122 (d) (6) refers to the accounting method employed in computing income was reaffirmed in *Robert Reis & Co.* v. *Commissioner*, 20 T. C. No. 36. The *Reis* case involved a situation where the liability for the excess profits tax was contested. It was held that the tax did not "accrue" in the year for which it was incurred, but that it accrued when the contest was settled and the tax was paid, under *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516.

[3] The Court's decision in the *Lewyt* case was entered April 9, 1953, and final decision has not yet been entered in the *Maxson* case. Thus, the time within which to file appeals to the Court of Appeals for the Second Circuit, the reviewing court for those cases, has not yet expired, and we understand the taxpayers will appeal.

[4] Even though the excess profits tax was repealed for years ending after December 31, 1945 (Sec. 122 (a), Revenue Act of 1945, c. 453, 59 Stat. 556), the statutory period for filing

2. The decision of the Court of Claims departs from the principle, established in numerous decisions of this Court, that a taxpayer on the accrual basis must take deductions in the year in which they accrue, regardless of when paid. *United States* v. *Anderson*, 269 U. S. 422; *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357; *Aluminum Castings Co.* v. *Routzahn*, 282 U. S. 92; *Security Mills Co.* v. *Commissioner*, 321 U. S. 281. Cf. *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516. Furthermore, the court below recognized that the clear language of the statute (Secs. 43, 48 (c) and 122 (d) (6) (see fn. 2, *supra*)), forbids an accrual basis taxpayer to deduct in one year excess profits taxes paid in that year but which accrued in an earlier year (R. 12). Nevertheless the court thought that it should read an exception into the statute and permit the claimed deduction in order to give effect to what it believed

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claims for net operating loss deductions does not expire until 39 months after the end of the taxable year of the net operating loss (Sec. 322 (b) (6), Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 322)). It is probable also that in a number of instances waivers have been filed which will extend the statutory period. (Sec. 322 (b) (3), Internal Revenue Code.) Moreover, since Section 122 (d) (6) applies in connection with determination of net operating losses up to and including the year ended June 30, 1950 (Sec. 304, Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137), the same issue can arise for all years prior to that date where the liability for excess profits taxes for years prior to 1946 was being contested and the taxes were accordingly not paid or accrued until a later year when the contest was settled. In *Robert Reis & Co.* v. *Commissioner*, *supra*, n. 2, the loss year was 1949.

was the intention of Congress (R. 13).[5] It reasoned that Congress must have intended that an accrual basis taxpayer should be allowed to deduct excess profits taxes paid but not accrued in the tax year in determining its net operating loss for that year because, otherwise, an accrual basis taxpayer would be denied the benefit of deducting excess profits taxes "in practically all cases", the court assuming that only rarely would excess profits taxes accrue in a year when an operating loss was sustained. (R. 13.) Even if the court were correct in its assumption, that could not justify disregard of the plain language of the statute.[6] As this Court recently

[5] *Birmingham* v. *Loeischer Co.*, 188 F. 2d 78 (C. A. 8); *Aramo-Stiftung* v. *Commissioner*, 172 F. 2d 896 (C. A. 2); and *Commissioner* v. *Clarion Oil Co.*, 148 F. 2d 671 (C. A. D. C.), certiorari denied, 325 U. S. 881, construing the words "paid or accrued" as used in Section 505 (a) of the Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 505), dealing with the penalty surtax on the undistributed profits of personal holding companies, furnish no support for the decision of the majority of the court below. See dissenting opinion of Judge Madden (R. 14) and the opinion of the Tax Court in *Lewyt Corp.* v. *Commissioner*, 18 T. C. 1245, 1252.

[6] If the principle of *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516, is applicable to federal income and excess profits taxes, an accrual basis taxpayer would get the benefits of this section where taxes for prior years were contested and not settled until the loss year. Although the Commissioner of Internal Revenue has recently taken the position before the Tax Court that the *Dixie Pine Co.* case is not governing with respect to federal income or excess profits taxes and that such tax "accrues" in the accounting period for which levied, this position was rejected in the recent case of *Robert Reis & Co.* v. *Commissioner*, 20 T. C. No. 36. The court also pointed out in that case that its holding therein, allowing an accrual

reiterated, provisions of tax law cannot be bent in particular cases in order to avoid "hardship" to the taxpayer or the Government. *Healy* v. *Commissioner*, 345 U. S. 278, 284–285. And see *Riley Co.* v. *Commissioner*, 311 U. S. 55, 59; *United States* v. *Hill*, 248 U. S. 420; *Commissioner* v. *Hecht Co.*, 163 F. 2d 194 (C. A. 4); and *Sabine Transp. Co.* v. *Commissioner* 128 F. 2d 945, 947 (C. A. 5); cf. *Helvering* v. *Twin Bell Syndicate*, 293 U. S. 312, 321.

As the Court stated in *Crooks* v. *Harrelson*, 282 U. S. 55, 60, to justify a court's departure from the terms of the statute "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." The Court of Claims here did not, and indeed could not, rely upon any legislative history to support its assumptions as to the "intent" of Congress. (See the Tax Court's discussion of the legislative history in *Lewyt Corp.* v. *Commissioner*, 18 T. C. 1245, 1251–1252). As Judge Madden stated in his dissenting opinion, to get the advantage of a net operating loss granted by the statute, the statute's "requirements should be met."[7]

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basis taxpayer to deduct, in computing its net operating loss for 1949, excess profits taxes for 1943 and 1944 which were in dispute and not settled until 1949, refutes a contention made by the taxpayer in the *Lewyt* case, *supra*, that to construe "paid or accrued" as used in Section 122 (d) (6) as referring to the taxpayer's method of accounting would deny accrual basis taxpayers any benefit under the section.

[7] In its motion for rehearing the Government again pointed out to the court below that its decision was inconsistent with Section 711 (a) (1) (J) and (a) (2) (L) of the Internal Revenue Code, which provides, for purposes of adjusting the excess profits net income, that in computing the net operating loss for

(R. 14.) Cf. *Reo Motors* v. *Commissioner*, 338 U. S. 442; *Standard Paving Co.* v. *Commissioner*, 190 F. 2d 330 (C. A. 10).

Furthermore, the court erred in rejecting the Government's contention that, since the excess profits taxes for 1945, which were claimed as a deduction in 1946 in computing the net operating loss, were later refunded or credited in full as a result of a net operating loss carry-back from 1947, the taxpayer did not suffer any real economic loss and was therefore not entitled to increase its operating loss deduction by a tax liability which was eliminated. The purpose of Section 122 (d) was to prevent "net losses from being used as a deduction by the taxpayer where he is not suffering any economic loss."

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any taxable year under Section 122 (a) and 122 (d) (6) (Appendix, *infra*, pp. 13, 14–15), "no deduction shall be allowed for any excess profits tax imposed by this chapter." The court below rejected that contention in its opinion on rehearing (R.19). The effect is to allow all excess profits taxes, both paid and accrued, to be deducted in arriving at the net operating loss to be carried back for income tax purposes, but not to allow any excess profit taxes to be deducted in arriving at the net operating loss to be carried back for excess profits tax purposes—a result which would seem inconsistent with any probable Congressional intention. Further, the court below erred in holding that Section 711 (a) (1) (J) and (a) (2) (L) do not apply even if taxpayer's excess profits tax liability for 1944 is to be determined under Section 710 (a) (1) (B). This result requires that the net operating loss for purpose of the two alternative computations of the excess profits tax be calculated in two different ways, again a highly improbable result. Compare *Sokol Bros. Furniture Co.* v. *Commissioner*, 185 F. 2d 222 (C. A. 5), certiorari denied, 340 U. S. 952, with *Basalt Rock Co.* v. *Commissioner*, 180 F. 2d 281 (C. A. 9), certiorari denied, 339 U. S. 966.

H. Rep. No. 855, 76th Cong., 1st Sess., p. 17 (1939–2 Cum. Bull. 504, 517). The taxpayer clearly should not be allowed to use the amount of excess profits taxes for 1945, which were paid but later refunded, to increase in a fictitious amount a net operating loss to be carried back to an earlier year.[8]

3. The decision below, if allowed to stand, may lead to completely anomalous consequences. Under it all taxpayers, whether on the cash or accrual basis of accounting, would appear to be able to deduct *all* excess profits taxes, both paid and accrued within any taxable year, for purposes of determining their net operating losses.[9] The decision could also result in allowing the excess profits taxes paid for a particular year to be used as a carry-back to wipe out or reduce the excess profits tax liability for that year. For example, if the net operating loss for 1946 here, resulting from the allowance of a deduction of the 1945 excess profits taxes, exceeded the 1944 net

[8] Cf. *Arrowsmith* v. *Commissioner*, 344 U. S. 6, where this Court, in determining the *nature* of a transaction which took place in 1944, considered events occurring in later years.

[9] In *Ohio Boxboard Co.* v. *Carey*, Civil No. 28356, now pending in the District Court for the Northern District of Ohio, a taxpayer with a net income for 1944 of $1,740,718.29 as determined by the Commissioner of Internal Revenue, is claiming the right to deduct 1943 excess profits taxes paid in 1944 of approximately $1,000,000 and also to deduct 1944 excess profits taxes accrued in that year of approximately $1,000,000, thus resulting in a claimed net loss of over $400,000.

income after necessary adjustments under Section 122 (d), the excess would be a carry-over to 1945 under Section 122 (b) (1) (Appendix, *infra*, pp. 13–14) and would be claimed as a deduction against the excess profits tax liability for 1945.[10] Thus, the 1945 excess profits taxes would be a factor in wiping out or reducing the very liability which they were paid to satisfy. Certainly, such incongruous results could not have been intended by Congress.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

MAY, 1953.

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[10] Such a claim was made in the *Lewyt* case before the Tax Court, but in view of that court's holding that the excess profits taxes were not deductible in computing the net operating loss deduction, the basis for the claim was eliminated.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [as added by Sec. 211 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 43 [as amended by Sec. 134 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall

not be allowed in computing net income for the period in which falls the date of the taxpayer's death.

(26 U. S. C. 1946 ed., Sec. 43.)

SEC. 48. DEFINITIONS.

When used in this chapter—

* * * * *

(c) *"Paid or Incurred," "Paid or accrued."*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * *

(26 U. S. C. 1946 ed., Sec. 48.)

SEC. 122 [as added by Sec. 211 (b) of the Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUCTION.

(a) [as amended by Sec. 105 (e) (3) (A) of the Revenue Act of 1942, *supra*] *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) [as amended by Sec. 153 (a) of the Revenue Act of 1942, *supra*] *Amount of Carry-Back and Carry-Over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions,

additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * *

(c) [as amended by Secs. 105 (e) (3) (B) and 153 (b) of the Revenue Act of 1942, *supra*] *Amount of Net Operating Loss Deduction.*—The amount of the net operating loss deduction shall be the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26 (e));

(d) [as amended by Sec. 105 (e) (3) (C) of the Revenue Act of 1942, *supra*] *Exceptions, Additions, and Limitations.*—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * * * *

(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year, subject to the following rules—

(A) No reduction in such tax shall be made by reason of the credit for income, war-profits, or excess-profits taxes paid to any foreign country or possession of the United States;

(B) Such tax shall be computed without regard to the adjustments provided in section 734; and

(C) Such tax, in the case of a consolidated return for excess-profits tax purposes, shall be allocated to the members of the affiliated group under regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * * *

(26 U. S. C. 1946 ed., Sec. 122.)

SEC. 710 [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974].

IMPOSITION OF TAX.

(a) [as amended by Sec. 201 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Imposition.*—

(1) [as amended by Sec. 202 of the Revenue Act of 1942, *supra*] *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) [as amended by Sec. 202 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] 95 per centum of the adjusted excess profits net income, or

(B) [as amended by Sec. 202 (b) of the Revenue Act of 1943, c. 63, 58 Stat. 21] an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided

in section 26 (e) (relating to income subject to the tax imposed by this subchapter), and without regard to 80 per centum of the credit provided in section 26 (h) (relating to credit for dividends paid on certain preferred stock).

* * * * *

(b) *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) [as amended by Sec. 204 of the Revenue Act of 1943, *supra*] *Specific exemption.*—A specific exemption of $10,000;

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) [as amended by Sec. 2 (a) of the Excess-Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and Sec. 204 (a) of the Revenue Act of 1942, *supra*] *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

* * * * *

(26 U. S. C. 1946 ed., Sec. 710.)

SEC. 711 [as added by Sec. 201 of the Second Revenue Act of 1940, *supra*]. EXCESS PROFITS NET INCOME.

(a) *Taxable Years Beginning After December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(J) [as added by Sec. 210 (a) of the Revenue Act of 1942, *supra*] *Net Operating Loss Deduction Adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under paragraph (2) (B) for such taxable year; * * *

* * * * *

(2) *Excess profits credit computed under invested capital credit.*—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

* * * * *

(L) [as added by Sec. 210 (b) of the Revenue Act of 1942, *supra*] *Net Operating Loss Deduction Adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year

under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under subparagraph (B) of this paragraph for such taxable year; * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 711.)

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